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No. _____

IN THE

Supreme Court Of The United States

October Term, 1984

MAGNOLIA BROKERAGE COMPANY, JERROLD DEAN THORNTON, LIGON SPECIALIZED HAULERS, INC., MAGNOLIA FREIGHT AGENCY, INC.,

Petitioners

v.

ANTHONY L. JACKSON, OLLIE JACKSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CHARLES COTESWORTH PINCKNEY
1700 First Alabama Bank Building
Birmingham, Alabama 35203
Phone (205) 250-5000

Counsel of Record for Petitioners

STEPHEN ASHFORD ROWE
1700 First Alabama Bank Building
Birmingham, Alabama 35203

Counsel for Petitioners

April 15, 1985

40 pp

QUESTIONS PRESENTED

1. Whether in an appeal from a federal district court exercising diversity jurisdiction the rule of a state statute applicable to appeals from money judgments in civil cases, which requires a defendant who unsuccessfully appeals to pay a monetary penalty to the plaintiff, may be applied in place of and to the exclusion of the applicable Federal Rules of Appellate Procedure, specifically Rule 8 and Rule 38.

2. Whether a panel of a court of appeals is entitled to disregard a controlling decision of this Court simply because a local circuit rule provides that a panel may not overrule a precedent of the circuit.

The following question presented is not relied upon in this petition:

3. Whether Ala. Code § 12-22-72 (1975) contravenes the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

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Supreme Court Of The United States

October Term, 1984

MAGNOLIA BROKERAGE COMPANY, JERROLD DEAN THORNTON, LIGON SPECIALIZED HAULERS, INC., MAGNOLIA FREIGHT AGENCY, INC.,
Petitioners

v.

ANTHONY L. JACKSON, OLLIE JACKSON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioners Magnolia Brokerage Company, Jerrold Dean Thornton, Ligon Specialized Haulers, Inc., and Magnolia Freight Agency, Inc. respectfully pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on November 21, 1984.

OPINION BELOW

The original opinion of the Court of Appeals is reported at 742 F.2d 1305 (11th Cir. 1984). The order which is the subject of this petition, not yet reported, appears in the appendix hereto. The memorandum opinion rendered by the District

Court for the Northern District of Alabama, which is not reported, appears in the appendix hereto.

JURISDICTION

The order of the Court of Appeals was entered on November 21, 1984. A timely petition for rehearing and suggestion of en banc consideration was denied on January 18, 1985, and this petition was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. *Ala. Code* § 12-22-72 (1975):

> § 12-22-72 *Affirmation of stayed judgment — Generally.*
>
> When a judgment or decree is entered or rendered for money, whether debt or damages, and the same has been stayed on appeal by the execution of bond, with surety, if the appellate court affirms the judgment of the court below, it must also enter judgment against all or any of the obligors on the bond for the amount of the affirmed judgment, 10 percent damages thereon and the costs of the appellate court; and, upon the appeal of any judgment or decree entered or rendered for any amount of commissions, fees or compensation fixed or determined by the trial court and taxed or allowed as costs, if the appellate court affirms the judgment or decree of the court below and the payment thereof has been stayed on such appeal, judgment shall be entered by the appellate court against all or any of the obligors on the bond for the amount affirmed, 10 percent damages thereon and the costs of the appellate court; provided, however, that if no supersedeas bond has been executed on such appeal, the appellate court, in the event of affirmance, shall increase the amount so allowed as costs by the court below in the judgment or decree appealed from by adding thereto 10 percent damages thereon and the costs of the appellate court. (Code 1852, §§ 3032, 3033; Code 1867, §§ 3500, 3501; Code 1876, §§ 3941, 3942; Code 1886, §§ 3661, 3662; Code 1896, § 478; Code 1907, § 2893; Code 1923, § 6153; Code 1940, T. 7, § 814; Acts 1951, No. 724, p. 1275.)

2. Rule 8, Federal Rules of Appellate Procedure:

Rule 8. *Stay or Injunction Pending Appeal*

(a) *Stay Must Ordinarily Be Sought in the First Instance in District Court; Motion for Stay in Court of Appeals.* Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court. A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the district court for the relief sought is not practicable, or that the district court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the district court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to the considerated by a single judge of the court.

(b) *Stay May Be Conditioned Upon Giving of Bond; Proceedings Against Sureties.* Relief available in the court of appeals under this rule may be conditioned upon the filing of a bond or other appropriate security in the district court. If security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the district court and irrevocably appoints the clerk of the district court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion in the district court without the necessity of an independent action. The motion and such notice of the motion as the district court prescribes may be served on the clerk of the district court,

who shall forthwith mail copies to the sureties if their addresses are known.

(c) *Stays in Criminal Cases.* Stays in criminal cases shall be had in accordance with the provisions of Rule 38 (a) of the Federal Rules of Criminal Procedure.

3. Rule 38, Federal Rules of Appellate Procedure:

Rule 38. *Damages for Delay*

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

STATEMENT OF THE CASE

As the result of a serious traffic accident, the respondents Anthony L. Jackson and Ollie Jackson brought a civil action against the petitioners Magnolia Brokerage Company, Jerrold Dean Thornton, Ligon Specialized Haulers, Inc., and Magnolia Freight Agency, Inc., in the United States District Court for the Northern District of Alabama. Subject matter jurisdiction was premised on diversity of citizenship.

After trial, judgment was entered on a jury verdict in favor of Anthony Jackson against all petitioners in the amount of $350,000.00, and in favor of Ollie Jackson and against all petitioners in the amount of $50,000.00. The case was submitted to the jury on the issues of negligence of the defendants, and wantonness of the defendants. The jury categorized the damage awards as compensatory damages, and the jury declined to award punitive damages. Punitive damages are authorized under Alabama law in the discretion of the jury if the jury finds a defendant guilty of wantonness.

Petitioners moved for new trial and for judgment notwithstanding the verdict, on the ground, among others, that the compensatory damage awards were excessive. The district court denied this motion. The district court found that the damages awarded exceeded the amount that the district court would have found appropriate but refused to order a new trial conditioned on remittitur, reasoning that, although the difference

in the verdict and the amount the court considered fair was "slightly shocking," it was not "totally shocking" to the court's judicial conscience.

Petitioners appealed to the Court of Appeals for the Eleventh Circuit. Their contentions on appeal were (1) that the district court erred in failing to apply the maximum recovery rule standard on the motion for new trial to the assertion that the verdict was excessive, (2) that the plaintiff was guilty of contributory negligence as a matter of law, and (3) that there was not sufficient evidence to support submission of the case to the jury on the theory of wantonness.

The Court of Appeals affirmed the judgments with opinion. This petition does not seek review of this judgment of the Court of Appeals.

The Respondents filed in the Court of Appeals an application styled "Petition for Allowance of Ten Percent Affirmance Fee" in which they prayed for a mandate assessing a penalty against the petitioners based on *Ala. Code* § 12-22-72 (1975). Petitioners opposed this application. The application was granted by the Court of Appeals in its order of November 21, 1984.

REASONS FOR GRANTING THE WRIT

1. The order of the Court of Appeals conflicts with a decision of another court of appeals and conflicts in principle with a decision of this Court.

The Alabama affirmance penalty statute, *Ala. Code* § 12-22-72 (1975), requires that a defendant who unsuccessfully appeals from a money judgment, and who stays the judgment pending appeal, must pay to the plaintiff an additional sum equal to ten percent (10%) of the judgment. The Alabama legislature has seen fit to use this mechanism to deter frivolous appeals in Alabama. *Montgomery Light & Water Power Co. v. Thombs,* 204 Ala. 678, 87 So. 205 (1920), *Chapman v. Rivers Construction Co.,* 284 Ala. 633, 227 So. 2d 403 (1969). The statute does not require or permit a determination whether the appeal is in fact frivolous.

The Alabama statute conflicts with Rule 38, Fed. R. App. P., in at least the respects that Rule 38 commits imposition of an additional award to the discretion of the court, that Rule 38 requires a determination by the court that the appeal is frivolous, and that Rule 38 applies to any appellant. By comparison, the Alabama statute commits no discretion to the court, applies whether or not the appeal is frivolous, and applies only to appealing defendants.

Applying the Alabama statute without considering Rule 38, Fed. R. App. P., the Court of Appeals awarded the respondents the additional amount of 10% of the judgment.

As a consequence of the *Erie* doctrine,[1] questions can arise when, in the course of a federal court's exercise of diversity jurisdiction, a state rule conflicts with a federal rule. This Court has decided how such questions are to be resolved when the federal rule is embodied in the Federal Rules of Civil Procedure. *Hanna v. Plumer,* 380 U.S. 460 (1965). In such cases, the federal rule is to be applied if the issue in question is addressed by the federal rule, if the federal rule is within the

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[1] *Erie v. Tompkins,* 304 U.S. 64 (1938).

scope of the rules enabling act, and if the federal rule is constitutional. *Hanna v. Plumer,* 380 U.S. at 463, 464.

Applied to the respondents' application for a penalty award in the case at bar, the rule of *Hanna v. Plumer* mandates application of Rule 38, Fed. R. App. P., rather than the Alabama affirmance penalty statute. There is a clear conflict between the federal rule and the state rule on the issue of damages for a frivolous appeal, the issue is directly addressed by the federal Rule 38, the federal Rule 38 is obviously within the scope of the enabling act, and the federal Rule 38 is obviously not unconstitutional. Under Rule 38, the respondents' application for a penalty award was due to be denied because there has been no suggestion that the appeal was frivolous, and there is no support for any finding that the appeal was frivolous. Indeed, the respondents made no effort to invoke Rule 38, but premised their application solely on the Alabama statute.

If it were contended that the Alabama statute is directed not to frivolous appeals, but instead was intended to compensate a plaintiff for a stay of his judgment, the result under *Hanna v. Plumer* would be the same, because Rule 8, Fed. R. App. P., controls the terms and conditions under which a stay of judgment may be granted in a federal court.

No reason ever has been articulated by either the respondents or the Court of Appeals why the Court of Appeals should not have followed *Hanna v. Plumer,* and applied Rule 38. The only possible grounds for distinguishing *Hanna v. Plumer* from the case at bar is that *Hanna* involved a rule in the Federal Rules of Civil Procedure, and this case involves a rule in the Federal Rules of Appellate Procedure. But this would be a meaningless distinction lacking of any merit or justification. No good reason exists why the rules of appellate procedure should not have the same significance under *Hanna v. Plumer* as the rules of civil procedure. Like the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure have been adopted by this Court in the exercise of authority specifically granted by Congress. 28 U.S.C. § 2072, 18 U.S.C. §§ 3771, 3772.

The United States Court of Appeals for the Fifth Circuit has followed *Hanna v. Plumer* and applied Rule 38, Fed. R. App. P., in the almost identical situation involving a similar Mississippi statute. *Affholder v. Southern Rock,* 746 F.2d 305 (5th Cir. 1984). In *Affholder,* the Fifth Circuit overruled its prior case of *Proctor v. Gissendaner,* 587 F.2d 182 (5th Cir. 1979), which is the case in which that court had originally applied the Alabama affirmance penalty statute to the exclusion of Rule 38, Fed. R. App. P.

Relying on *Hanna v. Plumer,* the Fifth Circuit held the Mississippi statute to be superseded by Rule 38, stating in its opinion:

> We conclude that Fed. R. App. Proc. 38 precludes such an automatic deterrent to the right to appeal and allows a Federal Appellate Court to chasten an unsuccessful appellant only when it finds an appeal to be frivolous. In doing so, we decline to follow a prior decision by a panel of this circuit holding the Mississippi statute applicable in federal diversity cases because that decision was rendered without consideration of Rule 38.

746 F.2d at 306.

The Court of Appeals in this case declared itself bound by the discredited Fifth Circuit precedent of *Proctor v. Gissendaner.* In so doing, the Court of Appeals did not consider *Hanna v. Plumer,* or Rule 38, Fed. R. App. P., or the rules enabling acts.

Instead, the panel of the Court of Appeals considered the issue foreclosed by *Proctor v. Gissendaner,* noting that in *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981), the Eleventh Circuit had adopted as binding precedent all decisions of the Fifth Circuit, including *Proctor.* Further, the panel considered itself without authority to depart from *Proctor,* under the local rule of the Eleventh Circuit which precludes a panel of the court from overruling a binding precedent of the circuit. *See, Bonner v. City of Prichard,* 661 F.2d at 1209. Petitioners were denied the opportunity for en banc considera-

tion in the Court of Appeals when their petition for rehearing was denied.

When in *Affholder v. Southern Rock,* the Fifth Circuit considered for the first time its case of *Proctor v. Gissendaner* in light of *Hanna v. Plumer,* the incorrectness of *Proctor* was so obvious that, after the panel concluded Fule 38, Fed. R. App. P., supersedes a state rule, the entire court reconsidered *Proctor sui sponte,* and unanimously overruled it. *Affholder v. Southern Rock,* 746 F.2d at 311.

There exists an irreconcilable conflict in decision between the Fifth Circuit decision of *Affholder v. Southern Rock,* and the Eleventh Circuit's order in this case. Further, the order of the Court of Appeals in this case, and the precedent upon which it is based, conflict in principle with *Hanna v. Plumer.*

This clear conflict warrants issuance of the writ.

2. The Question Presented Is A Question Of Importance.

If the order of the Court of Appeals had no practical impact beyond the present case, and if this case were considered in isolation, then the importance of the question would be difficult to demonstrate. A dispute over a $40,000.00 penalty, while important to these litigants, might not be deemed important by this Court.

But this case should not be considered only in isolation. This question affects every diversity case appeal by a defendant that reaches the Court of Appeals from a federal district court in Alabama. Although petitioners do not know the number of such appeals which reach the Court of Appeals in a typical year, it can safely be assumed that the number of such appeals is not insignificant. Unless there is a legislative change in the Alabama statute or in the statutory diversity jurisdiction, the impact of the Court of Appeal's error will continue year after year.

It could be said that every question urged in a petition for certiorari affects litigants who are similarly situated. The error

of the Court of Appeals in this case is atypical in that it affects every litigant in a comparatively broad category of cases — that is, the category of diversity cases in Alabama federal district courts from which a defendant appeals. It is further true that the error of the Court of the Appeals cuts across the spectrum of civil diversity cases. That is to say, the error affects tort cases in the same way and to the same extent it affects contract cases, or any other kind of civil diversity case.

Moreover, beyond the significance of the question for all Alabama diversity case appeals, the issue has potential impact in every other jurisdiction in which a state standard for punishing frivolous appeals differs from the standard of Rule 38. This case presents the opportunity for clarification that the Federal Rules of Appellate Procedure govern appeals in federal courts, just as the Federal Rules of Civil Procedure prevail in the district courts.

The legal error in the order of the Court of Appeals is plain. This error will affect every litigant in a given category of future cases. Therefore, the question is of sufficient importance to justify issuance of the writ.

3. Issuance of the writ is warranted as an exercise of this Court's supervisory authority over the Court of Appeals.

The proposition was established in *Hanna v. Plumer* that in federal court a federal rule of procedure generally controls over a conflicting state rule. The exceptions are clear-cut and permit application of the state rule only if the federal rule does not address the issue, or if the federal rule is beyond the scope of the enabling act, or if the federal rule is unconstitutional. In the case at bar, there is no colorable argument that application of Rule 38, Fed. R. App. P., fits any of these exceptions.

Application of the principles of *Hanna v. Plumer* in this case is so straightforward that it is almost mechanical. Such application would have resulted in denial of respondents' application for imposition of a penalty. Yet the Court of Appeals

did not follow *Hanna v. Plumer,* and indeed did not even acknowledge the existence of this controlling precedent.

The Court of Appeals has written to this same issue in one other reported case, *Locke v. Allstate Insurance Co.,* 696 F.2d 1340 (11th Cir. 1983). In addition, the Court of Appeals for the Fifth Circuit wrote to this question on two occasions before the Eleventh Circuit was separated from the Fifth Circuit in 1981, in *Proctor v. Gissendaner,* and in *King v. Ford Motor Co.,* 604 F.2d 317 (5th Cir. 1979). In none of these four instances did the court cite or apply *Hanna v. Plumer,* evidencing a dearth of analysis not appropriate in the federal courts. A federal court of appeals does not have the prerogative to overlook or ignore controlling precedent of this Court.

Litigants in the federal system are entitled to a higher level of jurisprudence than that reflected in the Eleventh Circuit's treatment to date of the affirmance penalty issue. Litigants are entitled to expect that controlling decisions of this Court at least be considered in the courts of appeals. *Jaffree v. Wallace,* 705 F.2d 1526, 1532 (11th Cir. 1983) ("Federal district courts and circuit courts are bound to adhere to controlling decisions of the Supreme Court.")

As matters now stand, the situation exists that the Eleventh Circuit continues to follow *Proctor v. Gissendaner,* a Fifth Circuit precedent that the Fifth Circuit has unanimously overruled in *Affholder v. Southern Rock,* and that directly conflicts in principle with this Court's decision in *Hanna v. Plumer.* In addition, it appears that a panel of the Eleventh Circuit is precluded by that court's local rule from even considering *Hanna v. Plumer,* because the panel below reasoned that only the court sitting en banc has the authority to reexamine *Proctor.*

The panel below committed fundamental and undefendable error when, on the basis of a local circuit rule, it gave greater deference to an overruled Fifth Circuit case than to a controlling precedent of this Court. The local circuit rule cannot justify disregard of a controlling decision of this Court.

These Petitioners respectively submit that the Court of Appeals' adherence to a Fifth Circuit precedent which the Fifth Circuit has overruled, coupled with the Court of Appeals' disregard of the controlling decision of this Court in *Hanna v. Plumer,* warrants issuance of the writ because the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's power of supervision.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order of the Eleventh Circuit entered November 21, 1984, such order should be vacated, and the Respondents' application for imposition of a penalty against these Petitioners should be denied.

Respectfully submitted,

CHARLES COTESWORTH PINCKNEY
1700 First Alabama Bank Bldg.
Birmingham, Alabama 35203

STEPHEN ASHFORD ROWE
1700 First Alabama Bank Bldg.
Birmingham, Alabama 35203

Counsel for Petitioners

April 15, 1985

APPENDICES

APPENDIX A-1

Jackson v. Magnolia Brokers, et. al., 742 F.2d 1305 (11th Cir. 1984):

Before GODBOLD, Chief Judge, RONEY, Circuit Judge, and TUTTLE, Senior Circuit Judge.

RONEY, Circuit Judge:

For injuries incurred when his automobile collided with a trailer truck, Anthony L. Jackson received a jury verdict for $350,000, his wife $50,000 for loss of services and consortium. The defendants argue on appeal that the district court applied the wrong standards in denying their motions for a new trial on the grounds that the verdict was against the weight of the evidence and excessive, and that their motions for a directed verdict and judgment notwithstanding the verdict should have been granted as to liability. Holding the district court properly applied the correct standards, we affirm.

In deciding whether the verdict was excessive, the district court reluctantly applied the "shocks the conscience of the court" standard, determining as follows:

> Philosophically this court feels that, as in criminal sentencings, there should be some standards of damages in personal injury cases which should not totally subject either plaintiffs or defendants to the inexpert assessments of jurors. Apparently, the only standard is whether the verdict shocks the conscience of the court. It is not clear whose conscience provides the measure; that of the trial judge or the appellate court.
>
> If this court were awarding damages, after a finding of liability, it would consider $250,000.00 to Anthony L. Jackson and $30,000.00 to Ollie Jackson as fair. There is a difference of $120,000.00. However, the court cannot say that the difference is indicative of bias, passion, prejudice, or corruptness or, in this day and time, that it is totally shocking. It was slightly shocking but not to the extent to evidence bias, passion, prejudice, or corruption. The court thus does not conclude that the verdict is excessive. However, the court's decision is based on the perception which the court has of the deference of appellate courts, by whose

decision this court is bound, to jury damage awards. The court's ruling should not be viewed on appeal as adding strength to verdict. If the matter were discretionary with the court, it would determine that $280,000.00 is a fair award and reduce the total judgments to $280,000.00. If the court's approach to making its decision is incorrect, it is in error.

The defendant argues that the court should have used the so-called "maximum recovery rule" rather than the "shocks the conscience" rule. It is quite apparent, however, that the maximum recovery rule is normally applied to determine the amount of remittitur that may be ordered in lieu of a new trial once the court has decided that the verdict is excessive. *Warren v. Ford Motor Credit Co.*, 693 F.2d 1373 (11th Cir. 1982); *see Gorsalitz v. Olin Mathieson Chemical Corp.*, 429 F.2d 1033 (5th Cir. 1970), *modified*, 456 F.2d 180 (5th Cir. 1972), *cert. denied*, 407 U.S. 921, 92 S.Ct. 2463, 32 L.Ed.2d 807 (1972); *Keyes v. Lauga*, 635 F.2d 330 (5th Cir. 1981); *Bonura v. Sea Land Service, Inc.*, 505 F.2d 665 (5th Cir. 1974). To the extent that the maximum recovery rule could be applied to determine excessiveness, it would do nothing more than set the figure that the jury could reach without shocking the conscience of the court under the traditional standard. *Allen v. Seacoast Products, Inc.*, 623 F.2d 355, 364 (5th Cir. 1980).

In any event, it is clear that the very function of the maximum recovery rule is to avoid a determination by a court as to what it might consider to be a "fair" award, such as the district court's indication here that $280,000 might be more appropriate than $400,000. Applying on review the correct standard of whether the jury verdict "shocks the conscience of the court," we conclude that notwithstanding the district court's doubts as to the size of the award the amount of the verdict in this case cannot be disturbed on appeal.

We also conclude that the district court's rulings on liability should stand on appeal. The accident occurred between 10:00 and 11:00 p.m. when plaintiff's car, while traveling at a speed of approximately 50-55 miles per hour, hit the rear end of a

trailer truck when the truck pulled onto the highway from the paved shoulder or emergency lane of the interstate. The road conditions were excellent and visibility good for night-time driving. The driver of the trailer truck saw the plaintiff approaching and saw the two left lanes occupied by two trailer trucks. The trailer truck pulled out onto the highway and the plaintiff collided with the truck. As a result of the collision, Jackson lost his right eye and has been fitted with a prosthetic right eye. He sustained a broken nose, multiple fractures to bones in the mid-face and injury to his left shoulder. He had medical expenses of $12,196.61. Jackson was also unable to work from May 16, 1982 until August 28, 1982, although he lost no wages and is doing the same work as a residential loan underwriter.

To grant a motion for new trial the district judge must find the verdict contrary to the great weight of the evidence. The judge can reweigh the evidence. The trial court will be reversed only for abuse of discretion. *Rabun v. Kimberly-Clark Corp.*, 678 F.2d 1053, 1060 (11th Cir. 1982). On motion for judgment notwithstanding the verdict, the court considers the evidence in the light most favorable to the nonmoving party and will grant the motion where the evidence so strongly and favorably points in favor of one party that reasonable men could not arrive at a contrary verdict. The judge cannot reweigh the evidence. *Warren v. Ford Motor Credit Corp.*, 693 F.2d 1373, 1374 (11th Cir. 1982) (citing *Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc)).

A review of the record demonstrates that the district court applied these proper standards in connection with the defendants' motions and is not subject to reversal on appeal.

Defendants claim that plaintiff was contributorily negligent and based this on the following evidence: the highway was straight and level, the weather clear and dry, visibility perfect, eye witnesses say the truck was visible for at least one mile, witnesses say the truck entered the highway when plaintiff's car was at least a mile away, truck lights and signal were on as the truck entered the highway, and other vehicles on the

highway pulled to the left lane. No obstructions blocked the view of the truck. Plaintiff did not change lanes or slow down. Plaintiff stated that he first saw the truck when he was within 200 feet of the truck. Plaintiff did not apply brakes until point of impact and was traveling at 50-55 miles per hour at impact. He admitted he misjudged the speed of the truck.

Contrary evidence showed that: defendant was parked in an emergency lane to make a routine check of his load, the Code of Alabama clearly instructs a driver to not proceed onto the highway from the emergency lane until such movement can be made with reasonable safety, the truck driver saw the plaintiff approaching, he saw two semi-trailers in the process of passing the plaintiff, and he pulled out into the same lane in which plaintiff was traveling. This evidence when viewed in the light most favorable to the plaintiff is substantial to support the issue of contributory negligence as a jury question. The evidence was sufficient to submit the question to the jury. The evidence was such that a jury could find the plaintiff was free from negligence which proximately contributed to his injury. *Kilcrease v. Harris,* 288 Ala. 245, 259 So.2d 797, 801 (1972).

Defendants argue that the issue of wantonness should not have gone to the jury because the evidence shows that defendant looked into his side mirrors for oncoming traffic prior to entering the highway but he did not look over his shoulder. Defendant saw headlights that he estimated to be a quarter of a mile away. He could not judge the distance of the oncoming traffic with complete accuracy but he assumed he had time to enter the interstate safely, and he assumed the more rapidly moving vehicles would move to the left lane.

Plaintiff maintains that defendant knew there was danger in moving back onto the highway, that he would be moving at a slow speed, that an automobile was approaching in that lane, that two trucks were approaching in the left lane and that plaintiff would have to change lanes.

The Alabama Supreme Court has defined wantonness as "the conscious doing of some act or the omission of some duty under the knowledge of the existing conditions, and conscious

that from doing of such act or omission of such duty injury will likely or probably result." *Kilcrease v. Harris,* 288 Ala. 245, 259 So.2d 797, 801 (1972). The evidence when viewed in the light most favorable to the plaintiff was substantial to support the wantonness instruction.

AFFIRMED.

APPENDIX A-2

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-7365

ANTHONY L. JACKSON, et al,
Plaintiffs, Appellees,

versus

MAGNOLIA BROKERAGE COMPANY, et al,
Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Alabama

ON PETITION FOR REHEARING
(November 21, 1984)

Before GODBOLD, Chief Judge, RONEY, Circuit Judge, and TUTTLE, Senior Circuit Judge.

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ PAUL H. RONEY

United States Circuit Judge

APPENDIX A-3

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-7365

ANTHONY L. JACKSON, et al.,
Plaintiffs-Appellees,

versus

MAGNOLIA BROKERAGE COMPANY, et al.,
Defendants-Appellants.

Appeal from the United States District Court
For the Northern District of Alabama

(November 21, 1984)

Before GODBOLD, Chief Judge, RONEY, Circuit Judge, and TUTTLE, Senior Circuit Judge.

O R D E R :

IT IS ORDERED that the application for 10% allowance to judgment pursuant to Title 12, Code of Alabama, Section 12-22-72 (1975) be, and the same hereby is, GRANTED.

The Fifth Circuit decided in *Proctor v. Gissendaner,* 587 F.2d 182 (5th Cir. 1979), that the Alabama statute which provides for the addition of 10% of a judgment which is stayed and unsuccessfully appealed is binding in a federal appellate court under *Erie v. Tompkins,* 304 U.S. 64, 82 L.Ed. 1188 (1938). This Court has adopted the decisions of the Court of Appeals for the Fifth Circuit rendered prior to October 1, 1981 as binding precedent of this Court, subject to overrule only by the court sitting *en banc. Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981). Accordingly, this Court is bound by *Proctor. See Locke v. Allstate Ins. Co.,* 696 F.2d 1340 (11th Cir. 1983); *King v. Ford Motor Co.,* 604 F.2d 317 (5th Cir.

1979). *See also Walters v. Inexco Oil Co.*, 725 F.2d 1014 (5th Cir. 1984); *but see Affholder v. Southern Rock*, ____ F.2d ____ (5th Cir. 1984) [No. 83-4420].

APPENDIX A-4

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-7365

ANTHONY L. JACKSON and OLLIE JACKSON,
Plaintiffs-Appellees,

versus

MAGNOLIA BROKERAGE COMPANY, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Alabama

(Opinion September 227, 2984, 742 F.2d 1305 (5th Cir. 1984)

Before GODBOLD, Chief Judge, RONEY, Circuit Judge, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

/s/ PAUL H. RONEY

United States Circuit Judge

APPENDIX A-5

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-7365

D.C. Docket No. CV82-PT-1628-S

ANTHONY L. JACKSON and OLLIE JACKSON,
Plaintiffs-Appellees,

versus

MAGNOLIA BROKERAGE COMPANY, et al.,
Defendants,

MAGNOLIA BROKERAGE COMPANY, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Alabama

Before GODBOLD, Chief Judge, RONEY, Circuit Judge, and TUTTLE, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that defendants-appellants pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: September 27, 1984
For the Court: Spencer D. Mercer, Clerk

By: /s/ MIGUEL J. CORTEZ, JR.
Deputy Clerk

ISSUED AS MANDATE: Jan. 29, 1985

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ANTHONY L. JACKSON and OLLIE JACKSON,
Plaintiffs,

v.

MAGNOLIA BROKERAGE COMPANY, et al.,
Defendants.

CIVIL ACTION NO.: CV82-PT-1628-S

MEMORANDUM OPINION

This cause comes on to be heard on defendants' Motion for Judgment Notwithstanding the Verdict or in the Alternative for New Trial filed on April 21, 1983. The court notes that grounds 5-19, 22 and 23 relate to rulings of the court which were duly considered at the trial. The motion will be overruled as to said grounds with brief comments as to a few of the grounds in the order stated. The court will not address each ground individually.

Grounds 5, 6, 7, 8, 15, 16 and 17. The court is satisfied that all the issues were for the jury. The court notes that the jury specifically did not award punitive damages.

Grounds 9, 10 and 11. These charges were given in substance.

Grounds 12, 13 and 14. The court is of the opinion that these charges place undue emphasis on the defense of contributory negligence and should not be given.

Grounds 18 and 19. The court gave defendants every opportunity to suggest error in the charge and to suggest a manner of addressing the jury's question. No exception was taken and no suggestion was given.

Grounds 22 and 23. The court is of the opinion that an emergency was not clearly created through fault of the plaintiffs and that the charge was appropriate.

Grounds 20 and 21. These grounds are precluded by F. R. Civ. P. 54 (c). See the rule, cases interpreting it and the comments thereunder.

Grounds 1-4. These grounds all pertain to the claimed excessiveness of the verdict and present the more difficult question for resolution. The only case cited by defendants in which an appellate court reduced an award for the loss of an eye is *Walker v. Von Elton Champion,* 274 So.2d 840 (La. App. 1973). The appellate court reduced a $100,000.00 bench award to $35,000.00. Defendants have suggested the verdict was excessive "particularly after considering the negligence of the plaintiff, Mr. Jackson. . . ." Of course, the court cannot take make any such comparative negligence assessment. Plaintiff has also cited *Allen v. Seacoast Products, Inc.,* 623 F.2d 355 (5th Cir. 1980). In *Allen* there was proof of $30,000.00 in loss of earnings. In *Allen* there was a dispute as to impairment of earning capacity. In this case there was no such proof. In *Allen* the medical expenses were $5,000.00. Here they were $13,000.00. In this case there was evidence of considerable pain, suffering and mental anguish and an initially grotesque injury.

Judge Brown stated in *Allen* that, "We have repeatedly held that the jury's award is not to be disturbed unless so large as to 'shock the judicial conscience' or indicate 'bias, passion, prejudice, corruption, or *other improper motive*' on the part of the jury." 623 F.2d at 364 (emphasis added). Further that, "Comparison of verdicts rendered in different cases is not a satisfactory method for determining excessiveness *vel non* in a particular case and . . . each case must be determined on its own facts." 623 F.2d at 364 (quoting *Fruit Indus., Inc. v. Petty,* 268 F.2d 391, 395 (5th Cir. 1959)). Judge Brown further stated that the award in *Allen* "is very generous but not shocking to our conscience." 623 F.2d at 366.

Plaintiff has also cited *Stineman v. Fontbonne College,* 664 F.2d 1082 (8th Cir. 1981). In that case an award of $800,000.00 for loss of vision in one eye was reduced to $600,000.00. The plaintiff in that case was also deaf. A dissenter cited a case in

which $1,000,067.00 had been awarded for the loss of an eye and argued that the $800,000.00 was not excessive.

Philosophically this court feels that, as in criminal sentencings, there should be some standards of damages in personal injury cases which should not totally subject either plaintiffs or defendants to the inexpert assessments of jurors. Apparently, the only standard is whether the verdict shocks the conscience of the court. It is not clear whose conscience provides the measure; that of the trial judge or the appellate court.

If this court were awarding damages, after a finding of liability, it would consider $250,000.00 to Anthony L. Jackson and $30,000.00 to Ollie Jackson as fair. There is a difference of $120,000.00. However, the court cannot say that the difference is indicative of bias, passion, prejudice, or corruptness or, in this day and time, that it is totally shocking. It was slightly shocking but not to the extent to evidence bias, passion, prejudice, or corruption. The court thus does not conclude that the verdict is excessive. However, the court's decision is based on the perception which the court has of the deference of appellate courts, by whose decisions this court is bound, to jury damage awards. The court's ruling should not be viewed on appeal as adding strength to the verdict. If the matter were discretionary with the court, it would determine that $280,000.00 is a fair award and reduce the total judgments to $280,000.00. If the court's approach to making its decision is incorrect, it is in error.

An order in accordance with this Memorandum Opinion will be entered contemporaneously herewith.

This the 18 day of May, 1983.

/s/ ROBERT B. PROPST

Robert B. Propst
United States District Judge

Office-Supreme Court, U.S.
FILED
MAY 20 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-1635

IN THE

Supreme Court Of The United States

October Term, 1984

MAGNOLIA BROKERAGE COMPANY, JERROLD DEAN THORNTON, LIGON SPECIALIZED HAULERS, INC., MAGNOLIA FREIGHT AGENCY, INC.,

Petitioners,

v.

ANTHONY L. JACKSON, OLLIE JACKSON,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ALEX WORTHY NEWTON
FRANCIS HUTCHESON HARE, JR.
700 City Federal Building
2030 Second Avenue North
Birmingham, Alabama 35203
(205) 328-5330

Counsel for Respondents

May 17, 1985

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NO. 84-1635

IN THE

Supreme Court Of The United States

October Term, 1984

MAGNOLIA BROKERAGE COMPANY, JERROI D DEAN THORNTON, LIGON SPECIALIZED HAULERS, INC., MAGNOLIA FREIGHT AGENCY, INC.,
Petitioners,

v.

ANTHONY L. JACKSON, OLLIE JACKSON,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

STATUTORY PROVISIONS INVOLVED

1. *Alabama Rules of Appellate Procedure:* Rule 38.

Rule 38. Damages for frivolous appeal.

In civil cases, if the appellate court shall determine on motion or ex mero motu that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

2. *Mississippi Code Annotated* §11-3-23 (Supp. 1984):

§11-3-23. Judgment for damages against appellant on affirmance of judgment or on failure to prosecute appeal — computation.

In case the judgment or decree of the court below be affirmed, or the appellant fails to prosecute his appeal to

effect, the supreme court shall render judgment against the appellant for damages, at the rate of fifteen percent (15%), as follows: If the judgment or decree affirmed be for a sum of money, the damages shall be upon such sum. If the judgment or decree before the possession of real or personal property, the damages shall be assessed on the value of the property. If the judgment or decree be for the dissolution of an injunction or other restraining process at law or in chancery, the damages shall be computed on the amount due the appellee which was enjoined or restrained. If the judgment or decree be for the dissolution of an injunction or other restraining process as to certain property, real or personal, or a certain interest in property, or be a judgment or decree for the sale of property, or some interest in it, to satisfy a sum out of the proceeds of sale, or to enforce or establish a lien or charge or claim upon or some interest in property, and the only matter complained of on the appeal is the decree as to some particular property or claim on it, the damages shall be computed on the value of the property or the interest in it, if the value of the property or interest in it be less than the judgment or decree against it; but if the value of the property or interest in it be greater than the amount of the judgment or decree against it, the damages shall be upon the amount of the judgment or decree; provided, however, the above penalty shall not be assessed against any condemnee appealing from a special court of eminent domain in any circumstances.

3. *Kentucky Revised Statute* §26A.300 (1980):

26A.300. Collection of judgment — Damages.

(1) When collection of a judgment for the payment of money has been stayed as provided in the Rules of Civil Procedure, there shall be no damages assessed on the first appeal as a matter of right contemplated by section 115 of the Constitution of Kentucky.

(2) When collection of a judgment for the payment of money has been stayed as provided in the Rules of Civil Procedure pending any other appeal, damages of ten percent (10%) on the amount stayed there shall be imposed against the appellant in the event the judgment is affirmed or the appeal is dismissed after having been docketed in an appellate court.

(3) Similar damages of ten percent (10%) shall be imposed when a petition for writ of certiorari, petition for rehearing, or other petition which stays collection of a judgment for the payment of money is denied by an appellate court under circumstances not constituting a first appeal under circumstances not constituting a first appeal under subsection (1) of this section.

(4) No additional penalty shall be imposed upon a party as a consequence of a review subsequent to a petition or a second appeal.

(5) Damages imposed under subsection (2) or (3) of this section shall not be payable and shall be void if the decision of the trial court awarding the payment of money is ultimately reversed. (Enact. Acts 1976, ch. 59, §1.)

4. *Virginia Code Annotated* §16.1-113 (Supp. 1984):

§16.1-113. How appeals tried; power of court when appeal not tried within two years.

Every such appeal shall be tried by the court in a summary way, or, if the amount in controversy exceeds fifty dollars, by a jury if either party requires it. All legal evidence produced by either party shall be heard, whether the same was produced or not before the court from which the appeal is taken. If judgment be recovered by the appellee, execution shall issue against the principal and his surety, jointly or separately, for the amount of the judgment, including interests and costs, with damages on the aggregate at the rate of ten percent annually, from the date of that judgment until payment, and for the costs of the appeal; and the execution shall be endorsed "No security is to be taken." If the decision be reversed, the party substantially prevailing shall recover his costs; and such order or judgment shall be made or given as ought to have been made or given by the judge of the court from which the appeal was taken. When the appeal is from an order or judgment under §§16.1-119 to 16.1-121, the court shall enter such judgment respecting the property, the expense of keeping it, and any injury done to it, as may be equitable among the parties.

No such appeal shall be striken from the docket or discontinued pursuant to §8.01-335. However, if such appeal is not tried within two years from the date the case has been docketed, then the court may, in the absence of good

cause show for such delay, and after notice to the appellant and his surety, if any, affirm the judgment or order rendered in the district court and award execution thereon against the appellant and his surety. (1956, c.555; 1980, c.129; 1984, c.38)

TABLE OF ABBREVIATIONS

"Petitioners" and/or "Magnolia"	Either of these terms is intended to refer to the petitioners in the present proceedings which were the appellants in the Eleventh Circuit Court of Appeals and the defendants in the District Court. In point of fact, there were four original defendants all of whom joined in the appeal to the Eleventh Circuit and all of whom join in the present petition; viz., Magnolia Brokerage Company, Jerrold Dean Thornton, Ligon Specialized Haulers, Inc., and Magnolia Freight Agency, Inc.
"Respondents" and/or "Jackson"	Anthony L. Jackson and his wife, Ollie Jackson, were the plaintiffs in the original action. They were the appellees in the Eleventh Circuit appeal and are the respondents in the present petition.
"Rule 8" and "Rule 38"	Either of these phrases is intended to refer to the applicable Federal Rule of Appellate Procedure.
"Subject Statute"	This phrase is intended to refer to Code of Alabama §12-22-75 (1975).

PRELIMINARY OBSERVATIONS

Jackson first notes that the Magnolia has expressly *not* raised the question of whether Alabama's affirmance fee statute is unconstitutional. Petitioners brief, p. i. Indeed, the Alabama Supreme Court has previously upheld the constitutionality of the subject statute. *Central of Ga. Ry. Co. v. Steed,* 287 Ala. 64, 76, 248 So.2d 110 (1971).

This Court has consistently recognized that as long as a state provides a full and fair trial on the merits, there is no requirement under the due process clause of the fourteenth amendment that appellate review be provided as well. See *Lindsey v. Normet,* 405 U.S. 56, 77 (1972). The Alabama Constitution contains no specific provision for appellate review. See *Johnson v. Barnes,* 250 Ala. 292, 34 So.2d 144 (1948); *Ex parte Tsimpides,* 272 Ala. 430, 434-37, 131 So.2d 873 (1961), cert. denied 369 U.S. 804 (1962). The right of appeal in Alabama is entirely statutory and is therefore subject to the conditions (such as the subject statute) enacted by the Alabama legislature.

The subject statute is applicable to money judgments affirmed on appeal. It is the first in a sequence of three statutes, each of which provides for a ten percent affirmance fee.[1] Each of these statutes are an integral part of an overall state scheme by which the state of Alabama administers its judicial system. For a period of over a hundred and sixty years[2] by a number of statutes enacted by the Alabama legislature and by a number of rules adopted by the Alabama Supreme Court, the State of Alabama has established a cohesive pattern of law governing every aspect of the Alabama's judicial system from filing costs to affirmance fees. The ruling which petitioner seeks would compel an intrusion by the federal courts into the state of Alabama's overall scheme for the administration of its judicial system and would result in a disruption of the integrated network of statutes and rules which make up the Alabama judicial system.

---

[1]See also Alabama Code §12-22-73 (1975) (right of property); Alabama Code §12-22-74 (1975) (recovery of chattels).

[2]The subject statute was first enacted by the Alabama Legislature in 1820. Clay's Digest, 309, §20. See *Ex parte Weissinger & Crook,* 7 Ala. 710, 712 (1845); *Lawrence v. Jones,* 37 Ala. 388, 389 (1861). It has since been readopted in essentially the same form in ten subsequent recompilations or recodifications of the Alabama Code. The legislative history of the subject statute appear in parenthesis at the end of the statute. See Petitioners brief p. 2.

The Alabama judicial system is a function of many interconnecting statutes and rules most (if not all) of which have counterparts in the Federal Rules of Civil Procedure and/or the Federal Rules of Appellate Procedure. The approach suggested by the petitioner would require this Court to ignore the legal, equitable, and practical considerations which influenced the Alabama legislature and the Alabama Supreme Court to enact and/or to adopt the various statutes and rules which together make up Alabama's judicial system. This would constitute the realization of the fear that Justice Harlan expressed in his concurring opinion in *Hanna*:

> ". . . it is hard to think of a case where a conflicting state rule would be allowed to operate even though the state rule reflected policy considerations which, under *Erie* would lie within the realm of state legislative policy."
>
> *Hanna v. Plumer*, 380 U.S. 460 at 480.

ARGUMENT

REASONS FOR DENYING THE WRIT

1. The Order of the Court of Appeals Is Correct In Light of the Prior Decisions of This Court.

Magnolia contends that the Alabama affirmance fee statute, *Ala. Code* §12-22-72 (1975), conflicts with *Fed. R. App. P.* Rule 38 and *Fed. R. App. P.* Rule 8. Magnolia's petition is essentially based on this Court's holding in *Hanna v. Plumer*, 380 U.S. 460 (1965) [hereinafter *Hanna*].

In *Hanna* and subsequently in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980) [hereinafter *Walker*] this Court clarified the analysis which a federal court should employ when, in an action based upon the court's exercise of diversity jurisdiction, a state law is alleged to conflict with a federal rule of procedure. If the federal rule "directly conflicts" with the state law, the court must then determine whether the federal rule is within the scope of the Enabling Act, 28 *U.S.C.* §2072 (1977), and is supported by a constitutional grant of federal power. *Hanna* at 471-474; *Walker* at 749.

Magnolia asserts that a *Hanna* analysis would reveal that in view of Rules 8 and/or 38, *Fed. R. App. P.*, it would be improper for a federal court in a diversity case to give application to Alabama's affirmance fee statute.

Jackson believes that petitioner's view of *Hanna* is defective. Petitioner contends that whenever it appears that the issue in question is merely "addressed by the federal rule", a *Hanna* analysis is essential. Petitioner brief, p. 6. According to petitioner, *Hanna* requires "almost mechanical" disregard for state law on all matters which are covered by a federal rule. Petitioner's brief, p. 10.

Respondents submit that a *Hanna* analysis that compels a federal court to disregard state law is dependent upon a preliminary finding of the existence of a "direct collision" or an "unavoidable collision" between the federal rule and the state law. *Hanna* at 470, 472; *Walker* at 749. In determining the existence of a direct collision, the court should give considera-

tion to the effect that application of the state law would have on the federal rule. In *Hanna* this Court dealt with a state law which if given effect would have totally defeated the purpose and the operation of the applicable federal rule. This Court alternatively noted:

> The Erie rule has never been invoked to *void* a Federal Rule. It is true that there have been cases where this Court had held applicable a state rule in the face of an argument that the situation was governed by one of the Federal Rules. But the holding of each such case was not that Erie commanded *displacement* of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, Erie commanded the enforcement of state law."
>
> *Hanna* at 470. (Emphasis supplied).

> To hold that a Federal Rule of Civil Procedure must *cease to function* whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress's attempt to exercise that power in the Enabling Act.
>
> *Hanna,* Id. at 473-474. (Emphasis supplied).
> See also *Walker* at 747-48.

Respondents submit that there is no direct or unavoidable collision between the subject statute and federal Rules 8 and/or 38 which voids or displaces these federal rules or causes them to cease to function.[3]

---

[3]It should be noted that the contrary is not true. Magnolia's position if adopted, would completely vitiate the Alabama statute in diversity cases. In consequence, defendants (citizens and non-citizens alike) in diversity actions in federal courts in Alabama would be accorded significantly different and better treatment than defendants in the state courts of Alabama. This effect is offensive to the *Erie* rationale (see *Hanna,* headnote 11 at 467) and would provide defendants with an illegitimate motive to remove cases to the federal court.

The Alabama statute is directed to a specific class of cases not expressly governed by Rule 38 and does not even purport to address the matters governed by Rule 8.

The Alabama statute applies only if three conditions are present: (1) a money judgment is entered; (2) the judgment is stayed on appeal; and (3) the appellate court affirms the judgment. *Snellings v. Builder's Supply,* 229 Ala. 1, 155 So. 858 (1934). Rule 38, in contrast, permits the appellate court to award damages and costs to any appellee if it determines that his appeal is frivolous.

It is significant to note that the Supreme Court of Alabama has adopted a state counterpart to federal Rule 38. *Ala. R. App. P.* Rule 38.[4] The two rules are virtually identical. Magnolia's contention that there is a direct conflict between the subject statute and Rule 38 which has the effect of voiding or displacing the rule or ceasing its function is utterly inconsistent with the fact that the Alabama Supreme Court has applied *both* the affirmance fee statute and the frivolous appeal rule. *McAnnally v. Levco, Inc.,* 456 So.2d 66, 67 (Ala. 1984). See also *Hutson v. Hutson,* 351 So.2d 588, 591 (Ala. Civ. App. 1977).

The Alabama affirmance fee statute is not designed to supplant the authority of an appellate court (state or federal) to impose monetary sanctions on appellants who prosecute frivolous appeals. Thus, both state and federal Rule 38 — and — the Alabama statute are parallel, not conflicting. Both the state and the federal rule apply only to frivolous appeals whereas the subject statute applies only to money judgments stayed on appeal and later affirmed. Put another way, each rule covers ground which the statute does not.

Nor does the Alabama statute conflict with Rule 8, *Fed. R. App. P.* That rule merely provides that a federal court of appeals may stay a judgment pending appeal and may condition such relief upon the filing of a bond or other security.

---

[4]In so doing, the Alabama Supreme Court did not repeal *Ala. Code* §12-22-72 (1975). See Appendix II, part A, to the *Ala. R. App. P.* which lists the statutes which are superseded or modified by the rules.

Rule 8 does not purport either to provide for or to prohibit the assessment of costs or damages against an unsuccessful appellant.

Magnolia cites the Fifth Circuit case of *Affholder v. Southern Rock, Inc.,* 746 F.2d 305 (5th Cir. 1984) as its principal authority in support of its position that a *Hanna* analysis should have required the lower court to disregard the Alabama statute.

There are critical distinctions between the Mississippi law at issue in *Affholder* and the Alabama law at issue in this case.

First, the Mississippi statute is much broader. It applies automatically to the affirmance of any judgment or decree or any failure to prosecute an appeal. *Miss. Code Ann.* §11-3-23 (Supp. 1984). The Mississippi statute, unlike the Alabama statute, has no conditions precedent to its application and covers every situation in which Rule 38 could conceivably apply. Thus, there is more of a "direct collision" between the Mississippi statute and the federal rule.

Secondly, unlike Alabama, Mississippi has *not* adopted any state counterpart to Rule 38. The sole and only provision of Mississippi law applicable to the appellate process was at issue in *Affholder.* Again, there is more of a "direct collision" between the Mississippi statute and the federal rule. The distinction is important. It evidences an entirely different state scheme for managing appeals.

Thirdly, Magnolia asserts that the sole and exclusive purpose of the subject statute is to "deter frivolous appeals", and, is therefore utterly embraced by and inconsistent with Rule 38. Petitioner's brief, p. 6. Petitioner mentions no other purpose served by the subject statute. Petitioner cites *Montgomery Light & Water Power Co. v. Thombs,* 204 Ala. 678, 87 So. 205 (1920) in support of this assertion. As to the *Thombs* case, the Alabama Supreme Court subsequently noted:

> While this court *incidentally observed* in Montgomery Light & Water Power Co. v. Thombs (citing) that §6153, Code, (the predecessor to §12-22-72) was intended to pen-

> alize frivolous or delay appeals, *it was not intended to assert that such was the only purpose*, . . ."
>
> *Snellings v. Builders' Supply Co.*, 229 Ala. 1, 156 So. 858 (1934). (Emphasis supplied).

In point of fact, the Alabama Supreme Court in an even later case held that "in our view, *the real purpose* of §814 (a later predecessor of §12-22-72) was to provide appellee litigants with the additional damages from superseded judgments when an affirmance has been ordered. *City of Birmingham v. Bowen*, 254 Ala. 41, 47, 47 So.2d 174 (1950). (Emphasis supplied).

The Eleventh Circuit has recognized this as the paramount purpose of the Alabama statute.

> The Alabama Supreme Court applied the 10 percent penalty, noting that the statute's purpose was to provide appellee litigants with additional damages from superseded judgments when an affirmance fee has been ordered.
>
> *Locke v. Allstate Insurance Co.*, 696 F.2d 1340, 1342 (11th Cir. 1983).

Thus, neither in purpose nor in operation does the Alabama statute directly collide with federal Rule 38.

As Justice Harlan observed in his concurring opinion in *Hanna*, the *Erie* decision reflected more than just the court's concerns about forum-shopping and equitable administration of the laws. 380 U.S. at 474. That decision remains "one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of power between the state and federal systems." *Id.* Alabama has not seen fit to permit the recovery of prejudgment interest on money judgments in tort cases. Prejudgment interest is recoverable in 25 states and in federal courts in actions arising under federal law. See Appendix I. The Alabama affirmance fee statute has an ex ante prejudgment interest effect which compensates the injured plaintiff for the additional expenses and attorney fees associated with an appeal and for the loss of the use of the

money judgment retained by the defendant during the pendency of his appeal. As the Fifth Circuit correctly concluded in *Proctor v. Gissendaner,* 587 F.2d 182, 184 (5th Cir. 1979), for purposes of *Erie* the Alabama statute is substantive, not merely procedural. As *Hanna* and *Walker* indicate, the *Erie* analysis is supplanted only if the state statute directly conflicts with a federal rule of procedure. If not, the state's policies, as embodied in its own statutes, must be honored by the federal court. Such is the case here.

2. The Order of the Court of Appeals Does Not Justify An Exercise of This Court's Supervisory Authority Over Courts of Appeal.

Magnolia argues that the Fifth Circuit's holding in *Affholder* compels the conclusion that wherever a federal rule is addressed to the same issue as a state rule, the application of the principles of *Hanna* is so straightforward that it is "almost mechanical." Petitioner's brief p. 10. For this reason, Magnolia contends that the Eleventh Circuit's failure to follow a *Hanna v. Plumer* analysis and thereby vitiate the Alabama statute warrants this Court's exercise of its supervisory authority over Courts of Appeal.

Petitioner's zeal concerning this assertion is reflected by the following:

> Litigants in the federal system are entitled to a higher level of jurisprudence than that reflected in the Eleventh Circuit's treatment to date of the affirmance penalty issue.
>
> Petitioners brief, p. 11.

Respondents submit that this criticism is excessive and unjustified. In two separate briefs, Magnolia brought the Fifth Circuit's opinion in *Affholder* to the Eleventh Circuit's attention. The Eleventh Circuit's order granting Jackson's motion for application of the affirmance fee specifically cites the *Affholder* case. Petitioner's brief, p. A-8. The critical distinctions between the Mississippi statute at issue in *Affholder* and the Alabama statute at issue in the present case have been previ-

ously set forth. The Eleventh Circuit was correct in declining to reject the Alabama statute by applying a *Hanna* analysis as the Fifth Circuit did in *Affholder* with respect to the Mississippi statute.

3. The Question Presented Is Of Importance Only To Alabama Litigants.

Magnolia argues that the question presented "has potential impact in every other jurisdiction in which a state standard for punishing frivolous appeals differs from the standard of Rule 38." Petitioners Brief, p. 10. Jackson submits that the decision which the petitioners seek in this case will have no effect outside of the state of Alabama.

The petitioners do not call the Court's attention to a single jurisdiction in which the state standard with respect to frivolous appeals differs from the federal Rule 38 standard. In point of fact, the petitioners do not call the Court's attention to any other jurisdiction which has not adopted a state statute or rule equivalent to federal Rule 38, Fed. R. App. P.

Respondents are aware of only two mandatory statutes similar to the Alabama statute at issue. Miss. Code Ann. §11-3-23 (Supp. 1984); Ky. Rev. Stat. §26A.300 (1980).[5] The Fifth Circuit has already determined that the Mississippi statute does not apply in federal actions based on diversity jurisdiction. Nor would the Kentucky statute apply upon affirmance of a federal district court judgment by a circuit court of appeals. The Kentucky provision exempts a first appeal as of right from damages upon affirmance. Ky. Rev. Stat. §26A.300(1); *Ash v. Security National Insurance Co.*, 574 S.W.2d 346, 347 (Ky. Ct. App. 1978).

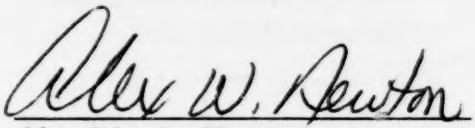
Thus, any decision in this case would effect Alabama litigants only.

[5]A somewhat similar Virginia statute applies only to appeals from trial courts not of record to those of general jurisdiction. Va. Code Ann. §16.1-113 (Supp. 1984). That provision clearly would not have any effect in federal proceedings.

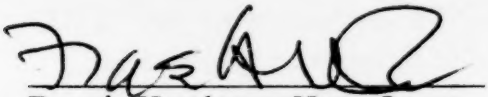
CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari in this case should be denied.

Respectfully submitted,



Alex Worthy Newton



Francis Hutcheson Hare, Jr.

HARE, WYNN, NEWELL & NEWTON
700 City Federal Building
Birmingham, Alabama 35203
(205) 328-5330

Counsel for Respondents

APPENDIX

APPENDIX I

A. STATES WHICH PERMIT RECOVERY OF PRE-JUDGMENT INTEREST IN TORT CASES

1. Alaska Stat. §§09.50.270; 45.45.010 (enacted 1968).
2. Cal. Civil Code §3291 (enacted 1982).
3. Colo. Rev. Stat. §13-21-101 (enacted 1935).
4. Conn. Gen. Stat. §37-3a (enacted 1981).
5. Hawaii Rev. Stat. §636-16 (enacted 1979).
6. Iowa Code §535.3 (enacted 1980).
7. La. Rev. Stat. Ann. §13-4203 (enacted 1916).
8. Me. Rev. Stat. Ann. tit. 14 §1602 (enacted 1969).
9. Md. Cts. & Jud. Proc. Code Ann. §11-301 (enacted 1980).
10. Mass. Ann. Laws Ch. 231 §6B, supp. §11 (enacted 1946).
11. Mich. Comp. Laws §600.6013 (enacted 1965).
12. Nev. Rev. State. §1 (b) 1974 (enacted 1979).
13. N.H. Rev. Stat. Ann. §524:1-b (enacted 1957).
14. N.J. Rev. Stat. §4:42-11 (b).
15. N.Y. Estates Power & Trust Law §5-4.3 (enacted 1967).
16. N.C. Gen. Stat. §24-5 (enacted 1981).
17. Ohio Rev. Code Ann. §1343.03 (enacted 1982).
18. Okla. Stat. tit. 12, §727 (2) (enacted 1971).
19. Pa. Con. Stat. §2.31 Rule 2.38 (1979).
20. R.I. Gen. Laws §9.21-10 (enacted 1958).
21. Tenn. Code Ann. §47-14-123 (enacted 1979).
22. Utah Code Ann. §15-1-4; 7-8-27-44 (enacted 1975).
23. Va. Code 8.01-382 (enacted 1979).
24. W. Va. Code §56-3-31 (enacted 1981).
25. Wis. Stat. §807.01 (enacted 1980).

B. PARTIAL LIST OF FEDERAL CASES WHICH RECOGNIZE THE RECOVERABILITY OF PREJUDGMENT INTEREST IN CASES ARISING UNDER FEDERAL LAW.

1. *Rodgers v. United States,* 332 U.S. 371 (1947). (Recognition of general proposition that federal courts may exercise equitable powers to grant prejudgment interest in certain cases arising under federal law.)
2. *Bricklayers' Pension Trust Fund v. Taiariol,* 671 F.2d 988, 989 (6th Cir. 1982) (Labor-Management Relations Act of 1947 and the Employment Retirement Income Security Act of 1974.)
3. *Olsen v. Shell Oil Co.,* 708 F.2d 976 (5th Cir. 1983) (Outer Continental Shelf Lands Act)
4. *Moore-McCormack Lines, Inc. v. Richardson,* 295 F.2d 583, 592-595 (2nd Cir. 1961), cert. denied 368 U.S. 989 (1962) (Death On The High Seas Act)
5. *Noritake Co. v. M/V Hellenic Champion,* 627 F.2d 724, 728 (5th Cir. 1980) (Death On The High Seas Act)
6. *General Motors Corp. v. Devex Corp.,* 461 U.S. 648 (1983) (patent infringement)
7. *National Airlines, Inc. v. Stiles,* 268 F.2d 400 (5th Cir. 1959)
8. *Mayer v. Branniff Airways, Inc.,* 310 F.Supp. 194 (N.D. Ill. 1970)
9. *In re Air Crash Disaster Near Chicago,* M.D.L. 391 (N.D. Ill. 1979)